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ALEXANDER L. STEVAS,
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No. 82-1643

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERSTATE COMMERCE COMMISSION, ET AL.,
Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 7, 1983
CERTIORARI GRANTED JUNE 20, 1983

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[1] The opinion and judgment of the court of appeals and the relevant decisions of the Interstate Commerce Commission are printed as appendices to the petition for a writ of certiorari filed in this case and will not be reprinted in this Appendix.

RELEVANT DOCKET ENTRIES

Date	Filings—Proceedings	80-7674

8/29/80 Flg. Petition for Review of Order of ICC & USA.

9/3/80 Flg. Motion of Ohio Motor Freight Tariff Committee, Inc. for leave to intervene.

9/3/80 Flg. Motion of Household Goods Carriers' Bureau, Inc. for leave to intervene.

9/3/80 Flg. Motion of Steel Carriers' Tariff Assn., Inc. for leave to intervene.

9/8/80 Flg. Motion of National Small Shipments Traffic Conference, Inc. & Drug & Toilet Preparation Traffic Conference, Inc. for leave to intervene.

9/8/80 Flg. Motion of Bulk Carrier Conference, Inc. for [leave] to intervene.

9/9/80 Flg. Motion of Heavy & Specialized Carriers Tariff Bureau for leave to intervene.

9/12/80 Flg. Motion of Alaska Carriers Assn., Inc. for leave to intervene.

9/16/80 Petitioners' Motion for stay pending appeal.

9/23/80 Flg. Memo of ICC in opposition to petitioners' motion for stay pending judicial review. (CE)

9/24/80 Flg. Motion of Ohio Motor Freight Tariff Committee, Inc. for stay pending review.

9/24/80 Flg. Motion of Household Goods Carriers' Bureau, Inc. for stay pending review.

9/24/80 Flg. Motion of Steel Carriers' Tariff Assn., Inc., for stay pending review.

9/24/80 Flg. Motion of Heavy & Specialized Carriers Tariff Bureau, etc. for stay pending review.

9/24/80 Flg. Motion of Alaska Carriers Assn., Inc., for stay pending review.

Date	Filings—Proceedings	80-7674

9/24/80 Flg. Motion of Nat'l Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Inc., for stay pending review.

9/24/80 Flg. Memo in support of Nat'l Small Shipments, etc., et al for stay pending review.

9/25/80 Flg. Motion of Bulk Carrier Conference, Inc. for stay pending review.

9/26/80 Flg. Motion of National Assn. of Specialized Carriers, Inc., for leave to intervene.

9/29/80 Flg. Memorandum of respondent Interstate Comm. Commission in opposition to intervening petitioners' motion for stay pending review.

10/2/80 Flg. Motion of Motor Carriers Traffic Assoc., Inc. to intervene as a petitioner.

10/1/80 Flg. Memo of respondents reply in opposition to intervening petitioners' motion for stay pending judicial review.

10/6/80 Flg. Order GRANTING motions of Ohio Motor, Et Al. for leave to intervene; it is further ordered that the motions of Petitioners and Petitioners-Intervenors for a stay pending review are GRANTED. (JCG, PA)

2/3/81 Flg. ORDER (1) GRANTING pet. mot. to amend petition for review to embrace order of the I.C.C. issued 12/30/80 in the same case; (2) GRANTING pet. mot. for leave to file reply to I.C.C.'s memo. in opposition to mot. [to] amend stay; (3) DENYING pet mot. to amend this Court's stay order entered 10/6/80, to embrace the order of the I.C.C. issued 12/30/80; (4) DENYING intervenors' mot. to stay the order of the I.C.C. issued 12/30/80; (5) respondents' mot. to dismiss the pet. for review is CARRIED WITH THE CASE insofar as it relates to the order of the I.C.C. issued 8/21/80, and in all other respects is DENIED; (6) GRANTING respondent mot. for ext. of time in which to file brief to and incld. 30 days from the date of this order. (JCG, PAK, JWH)

Date	Filings—Proceedings	80-7674

3/15/82 Case Assigned for 4/19/82 Atlanta Hearing Panel JCG-RLA-Hoffman

4/19/82 Case Argued

10/12/82 Opinion Rendered JCG Aff'd in pt., Reversed in pt. & Remanded

12/1/82 Petition for Rehearing (P) (G) Appellant En Banc

12/17/82 Response of ICC

1/7/83 Order Denying Rehearing

Service Date
Aug. 21, 1980

EC
FR-7035-01

TITLE 49—TRANSPORTATION

SUBTITLE B—OTHER REGULATIONS RELATING TO TRANSPORTATION

CHAPTER X—INTERSTATE COMMERCE COMMISSION

PART 1331—SECTION 5a APPLICATIONS

EX PARTE NO. 297 (Sub-No. 5)

MOTOR CARRIER RATE BUREAUS—IMPLEMENTATION OF PL 96-296

AGENCY: Interstate Commerce Commission

ACTION: Notice of Proposed Policy and Notice of Interim Requirements

SUMMARY: Section 14 of the Motor Carrier Act of 1980 imposes a number of new requirements and standards on motor carrier rate bureaus as a condition to their continued immunity from the antitrust laws. In this proceeding, the Commission will interpret and implement these new provisions. Interpretations contained in this notice are imposed on an interim basis. Amendments to existing rate bureau agreements or new or revised agreements must be filed within 120 days of enactment. At the same time, comments on the interpretations and proposed conditions are invited. Final standards will then be set. Once this phase of the proceeding is completed, the Commission will undertake review of each revised agreement to determine whether it meets all statutory requirements.

DATES: An original and 15 copies of comments must be filed with the Commission on or before 45 days from the date of this publication in the Federal Register.

ADDRESS: Comments should be sent to:

Room 5340
Interstate Commerce Commission
Washington, D.C. 20423

FOR FURTHER INFORMATION CONTACT:

Richard B. Felder or Jane F. Mackall
(202) 275-7693 (202) 275-7656

SUPPLEMENTARY INFORMATION

Motor carrier rate bureaus may be granted antitrust immunity to determine collectively motor carrier rates rules, practices, etc., provided that the agreements under which they function have been approved by the Interstate Commerce Commission. Approval of agreements hinges upon compliance with certain statutory requirements and rules promulgated by the Commission. P.L. 96-296, the Motor Carrier Act of 1980, has made a number of changes in the permissible scope of rate bureau agreements. These changes are quite broad and take many different forms. Some require little or no interpretation. Others leave to the Commission establishment of standards for their implementation. Some are effective immediately; others postponed to future years.

With the exception of certain limited areas, Congress did not authorize delay in implementation of these important changes. We find it necessary to adopt interim rules and conclude that notice of the interim rules would be impractical and contrary to the public interest. In fact, Section 14(e) of this legislation requires interim compliance, pending our final action on each agreement. Compliance, in certain cases, requires interpretation of the new language. Our experience under the 4R Act dem-

onstrates the importance of making our interpretations of new statutory provisions effective as soon as possible. Thus we are requiring interim compliance with the new standards, as interpreted in this decision.[1]

At the same time, the bureaus and other interested persons will have the opportunity to comment on our interim interpretations. As will be seen in our discussion of each new requirement, the need for interpretation is in most instances minimal. In some cases, the legislation reflects prior Commission findings and rules. In other cases, e.g., quorum standards, our interpretations are designed to be consistent with present bureau activities and should not be controversial. Under Section 14(e), violations of these interim standards and interpretations are grounds for immediate consideration of withdrawal of immunity.

Following our review of the comments, we will issue final standards. Section 14(e) provides 120 days for the filing of new or amended agreements. This should provide adequate time for us to finalize these standards before amendments are filed. Revisions will be required only to the extent that final rules change existing agreement provisions. Any agreement that is not amended within 120 days to conform to our final standards could be immediately considered for termination. To simplify the amendment process, we are offering sample amendments that bureaus may consider.[2] The exact wording of our samples need not be adopted. However, in any case where we do not believe the amendment conforms to our final interpretation, we will disapprove the proposed agreement and consider terminating the existing one. Compliance with our findings at these two stages will ensure continued antitrust immunity through the first phase of this proceeding.

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[1] To the extent necesary, we are also ordering changes in by-laws. By-laws must be consistent with our interpretations.

[2] Not all of the new provisions need be applicable to each bureau. Amendments will be required only in those areas applicable to a bureau's activities.

Implementation of the specific restrictions set out in new § 10706(b)(3) does not, by itself, fulfill the Commission's statutory obligations in this area. Under the standard of review of § 10706(b)(2), the Commission is directed to approve collective ratemaking agreements, if all specific statutory conditions are fulfilled, unless it finds that any such agreement is inconsistent with the National Transportation Policy (NTP). Moreover, the Commission may require compliance with any reasonable conditions to assure that the agreement furthers this transportation policy.

In the second stage of this proceeding, all agreements will be reviewed in light of the NTP as well as their compliance with specific sections of the Act. It is clear that even if a bureau is in compliance with § 10706(b)(3), continued immunity is not automatic. Therefore, in this second stage we will consider, for each bureau, the need for continued immunity under the standards of § 10706, including § 10706(b)(2).

Comments on our approach in this second stage are not requested at this time and will not be considered. At this point, we are concerned with implementing the specific restrictions contained in the revised statute. Our discussion of the second stage is included now only to give parties an overview of our intentions in the rate bureau area and to give advance notice that compliance with this first stage will not necessarily guarantee immunity in the future.

The Commission has terminated the proceedings in Ex Parte No. 297 (Sub-No. 3), *Modified Terms and Conditions for Approval of Collective Ratemaking Agreements under Section 5a of the Interstate Commerce Act*, and in Ex Parte No. 297 (Sub-No. 4), *Reopening of Section 5A Application Proceedings to Take Additional Evidence*. However, we take official notice of the comments submitted on the record in those proceedings where they are relevant to the proposals at issue here.

In addition, we take official notice of the comments made by the Federal Trade Commission (FTC) in its

petition filed December 18, 1979, to reopen the record in Ex Parte No. 297 (Sub-No. 4), to the extent that that petition is relevant to the issues involved in this proceeding. We originally allowed parties 90 days to reply to the FTC's petition but have recently postponed this due date. We will permit parties to address the matters raised in that petition to the extent they remain relevant as a part of their comments in support of their new agreements in the second stage of this proceeding.

We will now proceed to a discussion of the specific changes for which amendments must be filed. While certain of the changes are not effective immediately, we are requiring amendments to conform to the legislation on these matters as well. This will avoid further fragmentation of the proceeding.

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IV. BURDEN OF PROOF OF VIOLATIONS AND EFFECT OF VIOLATIONS

§ 10706(b)(3)(E) provides:

> In any proceeding in which a party to such proceeding alleges that a carrier voted, discussed, or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote, discussion, or agreement occurred. A showing [of] parallel behavior does not satisfy that burden by itself.

The section places the burden of proof upon the party alleging violation to show that the alleged event occurred. The reference to "parallel behavior" (behavior of one or more parties that is similar or identical but absent proof of intent by the party to agree upon a rate) means that it is not enough to show that the carrier ultimately published the same rate. Obviously, this proof is extremely difficult. In order to ensure compliance, the Commission must rely, to a great extent, on shipper monitoring of

bureau and carrier activities. The open meeting requirement will certainly assist in this task. However, we believe it would be unduly burdensome to require shippers to attend all meetings. We believe some sort of record-keeping requirement is necessary to ensure adequate access to necessary information. In the interim, bureaus will make sound recordings of all meetings and maintain them for the Statute of Limitations period. Typed transcriptions of these recordings must be made available for purchase, upon request. The purchase price should be no more than the cost of reproduction. The recordings must also be made available for use at bureau offices. We seek comments on this as a final standard. Another alternative which must be considered is a transcript requirement. As this could be more expensive than sound recordings, we have chosen the latter as the interim standard.

One troublesome aspect of past regulation of rate bureaus has been the lack of definite remedies for proven violations. In addition to the obvious potential remedy of withdrawal of immunity when serious and continuing violations occur, we propose to adopt a standard that provides that proof of significant violations of an agreement (*i.e.*, actions outside the scope of permissible activities) will automatically result in tariff rejection. If the allegations of improper activity are not sufficient to warrant rejection, they will be considered as grounds for suspension or investigation of the tariff item. Rejection, suspension, or investigation for actions beyond the scope of permissible bureau activity, should not be viewed as restricting other remedies under the antitrust laws. This procedure merely will provide an immediate administrative remedy which will ensure the integrity and consistency of our regulation, to the extent rate bureau activity affects matters before us.

We seek comments on this approach and invite presentation of alternate solutions to this issue.

Sample Amendment

Transcripts (or sound recordings) of all meetings will be made and kept available for viewing at the bureau. Copies of transcripts (or sound recordings) are available for purchase.

V. CONCLUSIONS

Oral hearings do not appear to be necessary at this time and none are contemplated. Anyone wishing to present views and evidence, either in support of or in opposition to these proposals, is invited to submit written data, views, or arguments within 30 days. While actual rules have not been proposed, this notice provides adequate notice of contemplated actions. We are not yet certain whether all these changes warrant rules in the CFR. § 10706(b)(3)(F), for example, seems to require regulations. Other statutory provisions are self-executing. While we recommend selective adoption of rules, an argument can be made that it is useful to have a complete set of regulations. We seek comment on this issue. In any case, existing rules (similar or different from P.L. 96-296) will be repealed or amended to conform to the new law.

We anticipate that final standards or rules will be completed in time to permit revised agreements to be filed within 120 days of enactment. If we are unable to meet this timetable, revised agreements consistent with this notice will be required.

It does not appear that this action will affect significantly the quality of the human environment or conservation of energy resources. However, comments on this issue are also invited.

Authority: P.L. 96-196, 49 U.S.C. 10321, 10706, 5 U.S.C. 553.

Decided: August 1, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis and Gilliam. Commissioner Gilliam concurring with a

separate expression. Vice Chairman Gresham dissenting in part with a separate expression. Commissioner Stafford dissented with a separate expression.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

COMMISSIONER GILLIAM, concurring:

In the Motor Carrier Act of 1980, the Congress has provided the Commission with specific guidelines for approving collective ratemaking agreements. The new statute requires that the Commission approve any agreement conforming to the restrictions imposed under the statute, unless we determine that the agreement is inconsistent with the transportation policy. The legislative history reveals that Congress specifically intended to reduce the substantial discretion previously invested in the Commission to approve or disapprove rate bureau agreements. In reference to Section 14, the House Report states that "This is a clear example of Congress defining the limits which it believes the Commission should follow in reducing the discretion of the Commission to expand those limits." In this regard, the Report emphasizes that the legislation is not designed to eliminate rate bureaus. The creation of an independent Study Commission to examine the need for continued antitrust immunity is further evidence that the Congress and not the Interstate Commerce Commission will decide the ultimate fate of the rate bureaus.

The interim interpretations adopted here exceed the parameters imposed by the Congress on our discretion in the following ways. Before discussing the specific problems I have with these interpretations it is important to clarify the role of the Commission under the statute.

The duty of the Commission is to approve or disapprove collective ratemaking agreements submitted by the car-

riers. Antitrust immunity automatically follows by statute once approval is given, if the carriers adhere to the specific terms of their agreements. If they do not, they are automatically operating without immunity, subject to the operation of the antitrust laws. The carriers do not continue to be immunized while engaging in activities which are contrary to the terms of their agreement. It is not necessary for the Commission to first revoke their existing agreement in order for the carriers to become liable for antitrust violations.

The interim solution promulgated by this decision states that under Section 14(e), violations of these interim standards and interpretations are grounds for immediate consideration of withdrawal of immunity. This statement is erroneous. The Commission has not been vested by Section 14(e) with the power to withdraw interim immunity. What the statute does provide is continued immunity under previously approved agreements during the period in which new or amended agreements are being finally disposed of by the Commission. This interim immunity is conditioned upon compliance by the ratemaking organization with the statutory section including amendments made by this section and regulations issued under such amendments. If the conditions are not met, then the carriers have no interim immunity and operate subject to the antitrust laws until a final decision is made by the Commission on their new agreements. This interpretation of the statute applies equally to the other references to termination for specific causes which are contained in the decision.

A potentially more serious problem of exceeding the Congressional mandate arises from the interpretation of available remedies. The provision for suspension or investigation of rates on the basis of allegations of "improper activity" in my view goes beyond the Congressional intent. As in the prior statute the Commission's power in the rate bureau area is limited to approval or disapproval of agreements. It is the clear Congressional

intent that the Commission "stay within the powers specifically vested in it by the revised laws". As I have already stated, the Congress intended to limit our discretion not increase it. To my knowledge, the Commission has never suspended a rate on the grounds that a carrier violated its rate bureau agreement. The proper remedy appears to be under the antitrust laws to which the carrier would be automatically subject by engaging in unapproved activities. In fact the statute increases the efficacy of available remedies under the antitrust laws by providing for public scrutiny of rate bureaus, which argues against the necessity for excessive involvement by the Commission in the enforcement end of collective ratemaking.

VICE CHAIRMAN GRESHAM, dissenting in part:

If I were the author of this notice, I would have included the following quote from the House Report (H.R. Rep. No. 96-1069, 96th Cong., 2nd Sess., p. 29 (1980).) in the notice:

> In other parts of the rate bureau section of the bill, the Committee has proposed to reduce the amount of discretion that the Commission has to approve or disapprove rate bureau agreements. This reduction in Commission discretion goes hand-in-hand with the other reforms proposed in the rate bureau process. This is a clear example of Congress defining the limits which it believes the Commission should follow in reducing the discretion of the Commission to expand those limits. When the parties to an agreement meet all the conditions in the section, there is a presumption that the Commission should find the agreement to be in the public interest.

In my opinion, we must follow the Congressional direction explicated in this passage which is similar to language found at page 31 of the Senate Report (S. Rep.

No. 96-641, 96th Cong., 2nd Sess. (1980).) It is in this spirit that I issue this dissent.

Apart from the general tone of the notice, I agree with the rules or standards proposed by the majority with two exceptions. First, while I strongly endorse the proposal to prohibit rate Bureaus from requiring independent actors to docket their proposals, I would not at this time dictate to an independently acting carrier that it may not docket a proposal or that it may do so only at a prescribed time, except for those proposals which are singled out for different treatment under 49 U.S.C. 10706(b)(3)(C).

The Motor Carrier Act of 1980, which we here are proposing to implement, explicitly permits rate bureaus to discuss single line rates, with the previously noted exceptions, until 1984. Congress chose to allow this until 1984 and I am unwilling to undo that which Congress has mandated. Furthermore, I believe we do not have the authority to do so.

Second, I am not in favor of adopting the requirements that sound recordings be kept and that copies of these recordings and typed transcripts be made available for purchase upon request. Congress has added 49 U.S.C. (b)(3)(B)(v), which imposes "sunshine" requirements which I believe are adequate yet reasonable. Thus, I do not support the majority's proposal to supplement those requirements.

COMMISSIONER STAFFORD, dissenting:

Today's decision fails to give any consideration or credence to the principal concern of Congress that the rate bureau as an institution be retained without major changes until Congress has received the report and recommendations of the Motor Carrier Ratemaking Study Commission. The rush to make changes herein, proposed administrative actions which presage renewed investigations of rate bureaus, threats to remove antitrust immunity, and separate actions or potential actions in other

areas of ratemaking can lead but to one conclusion, this is a determined administrative effort to dismantle the rate bureaus as speedily as possible. Obviously, Congress did not establish the elaborate provisions regarding the Study Commission unless it expected that organization to do more than to rubber stamp interim actions of this Commission.

Turning next to specific aspects of the decision, the following areas raise serious legal and administrative problems.

1. *Sample forms.* The decision seeks to establish uniform provisions to be used by all rate bureaus. While uniformity is desirable in some circumstances, the situation at hand is not one of them. The establishment of rates and related matters are the prerogatives of the carriers, not the Commission, and I would defer to the distinctive needs of groups of carriers in a rate bureau [1] *providing* that the agreements are in conformity with the Act.

2. *Docketing.* When is a "docketing" a "docketing"? The interpretation of what constitutes docketing of a proposal, whether by independent action or otherwise, should be simply left open for comment. Without question, the interpretations offered in various sections of today's decision are complex, unclear, and will lead to disputes. Clearly, this agency should not attempt to act as a rate bureau, as is evident from the regulations applying to independent actions.

3. *Penalties.* The decision proposes to reject a rate tariff automatically if there are significant violations of an agreement. This is a drastic action and appears to be

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[1] Cf., for example, the rate bureaus established by household goods carriers. The latter are a distinctive group of carriers, have a separate uniform system of accounts (49 CFR Part 1207, table III, et seq.), prepare a separate annual report (Form M-H), and are presently being given separate consideration by Congress in pending legislation. See, S. 1798, Household Goods Transportation Act of 1979, Section 4, in connection with antitrust immunity.

beyond the powers allotted to the Commission. In any event, rejection of a tariff should be automatically stayed pending an appeal.

In summary, I am concerned lest this and related decisions or actions lead inevitably to the dismanting of the rate bureaus even before the Study Commission, an expert independent body, has reviewed the matter and has made its recommendations to Congress.

SUPREME COURT OF THE UNITED STATES

No. 82-1643

INTERSTATE COMMERCE COMMISSION, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATION, INC., ET AL.

ORDER ALLOWING CERTIORARI
Filed June 20, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted.

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